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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

Office Supreme Court U. S.
FILED
APR 16 1903
JAMES H. McKENNEY,
Clerk.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

against

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDMUND F. TRABUE,
GEORGE BURNHAM, JR.,
SEWELL T. TYNG,
Of counsel for appellant.

WASHINGTON, April 14, 1903.

[18,437.]

No. 263

Motion to advance

Filed Apr. 29, 1902.

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No. 584.

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Appellant,

vs.

JAMES S. PHELPS AND THE FIDELITY TRUST AND SAFETY VAULT COMPANY
Appellees.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

MOTION TO ADVANCE UNDER RULE 26.

WILLIAM D. GUTHRIE,
GEORGE BURNHAM, JR.,
EDMUND F. TRABUE,
Of counsel for appellant.

[18,437.]

SUPREME COURT OF THE UNITED STATES,

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vs.
JAMES S. PHELPS and the FIDELITY TRUST AND SAFETY VAULT COMPANY,
Appellees.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

NOTICE OF MOTION TO ADVANCE UNDER RULE 26.

Notice is hereby given that, upon the record in the above entitled case, the annexed motion to advance the same upon the docket and set it down for hearing at as early a day as may be convenient to the court will be presented and submitted to the Supreme Court of the United States at the Capitol, in the City of Washington, on Monday, the 5th day of May, 1902, at the opening of court on that day, or as soon thereafter as counsel can be heard.

April 24, 1902.

WILLIAM D. GUTHRIE,
GEORGE BURNHAM, JR.,
EDMUND F. TRABUE,
of counsel for appellant.

To

ZACK PHELPS and
BENJAMIN F. WASHER, Esqs.,
of counsel for appellees.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

No. 584.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

vs.

JAMES S. PHELPS and the FIDELITY TRUST AND SAFETY VAULT COMPANY,
Appellees.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

MOTION TO ADVANCE UNDER RULE 26.

The appellant in the above-entitled case moves upon the record that this case be advanced for argument, and respectfully submits the following reasons why the motion should be granted, viz.

I.

The fundamental question in this case is whether a federal court can enjoin a receiver appointed by a state court and acting under a judgment void because of want of due process and under an order of appointment, similarly void, and hence in conflict with the Fourteenth Amendment of the Constitution of the United States, or whether the power is denied by section 720 of the Revised Statutes, providing that, except when authorized by a bankruptcy law, "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state."

Briefly stated, the facts are that the circuit court of the United States for the district of Kentucky granted

an interlocutory injunction restraining the Fidelity Trust and Safety Vault Company, a receiver appointed by the state court, from collecting premiums and assessments due from policy-holders of the appellant association and applying the same to the payment of an alleged void judgment in favor of Phelps upon the ground that the order appointing the receiver was void and without due process. This decision was, however, reversed in the Circuit Court of Appeals, which based its decision mainly upon section 720 of the Revised Statutes (*Phelps* v. *Mutual Reserve Fund Life Ass'n*, 112 Fed. Rep. 453).

On the one hand, the appellant contends that the trust company, as receiver, is a mere trespasser unlawfully interfering with its business, that the fact that a receiver appointed by a state court attempts to justify such trespass under a void judgment or void order is of no more effect than if it were acting under a void or unconstitutional statute, and that if the case otherwise presents features justifying relief in equity, section 720 of the Revised Statutes does not deprive a federal court of equity of jurisdiction. On the other hand, the appellees contend that such a receiver, although acting under a void judgment and a void order, cannot be restrained by a federal court because of the restriction contained in section 720.

II.

The constitutional question involved is novel and important and has never been decided by this court. Pending an adjudication in this court, the uncertainty as to the final outcome of the litigation and as to the relation between the appellant and its policy-holders, threatens a

multiplicity of similar suits, many of which have already been instituted, and will seriously embarrass the collection of premiums and assessments, which are absolutely necessary for the payment of death claims. The number of policy-holders affected by this litigation is many thousand, and the delay of two years which will result if the case must take its regular order upon the docket may result in widespread loss to innocent beneficiaries, who, under the system of mutual insurance adopted by the association, can only be paid by the appellant from the proceeds of current premiums. If these premiums and assessments are diverted, the death claims must remain unpaid, for no other fund exists with which to pay them. It is submitted that the case is one of extraordinary hardship to a large class and that it is of general and public interest within the rules laid down for advancements. Moreover, there is the danger, if not prospect, of a conflict of jurisdiction between the state and federal courts which should be avoided by a prompt and authoritative adjudication by this court within the doctrine enunciated in *Forsyth* v. *Hammond*, 166 U. S. 506.

III.

The appellant, therefore, prays that the case be advanced upon the docket and heard at as early a day as may be convenient to the court.

Notice of this motion has been served on counsel for the appellees.

WASHINGTON, May 5, 1902.

WILLIAM D. GUTHRIE,
GEORGE BURNHAM, Jr.,
EDMUND F. TRABUE,
of counsel for appellant.

[18,437.]

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appellant,*

AGAINST

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decision of the Circuit Court of Appeals for the sixth circuit, rendered December 3, 1901 (112 Fed. Rep. 453), reversing an interlocutory decree of the Circuit Court of the United States for the western district of Kentucky (103 Fed. Rep. 515). The appellant Association exhibited its bill of complaint in the Circuit Court, invoking the federal jurisdiction both on the ground of diverse citizenship and of a right arising under the Constitution of the United States. The object of the bill was to restrain the appellees from proceeding under an order of the Circuit Court of Jefferson County, Kentucky, appointing the appellee company receiver of the appellant Association at the suit of appellee Phelps. In support of its prayer for an injunction, the Associa-

tion averred that the order of the state court was void for lack of jurisdiction; that its enforcement, which was imminent, would injure the Association largely in excess of $2,000; that the injury would also be irreparable, without remedy at law, and would give rise to a multitude of suits; and that, unless the injunction were granted, the Association would be deprived of its property without due process of law, and denied the equal protection of the laws in contravention of the Fourteenth Amendment (record, pp. 1–37). A temporary injunction was granted (p. 9). The defendants demurred to the bill for want of equity and on the ground that the Circuit Court had no jurisdiction to hear and determine the action because the amount involved was insufficient and because of section 720 of the Revised Statutes which prohibits an injunction to stay proceedings in any court of a state, except as authorized in bankruptcy cases (p. 42). Subsequently, the defendants moved to dissolve the preliminary injunction, *solely on the ground that the Circuit Court had no jurisdiction* (pp. 43–44). The averments of the bill were in no way challenged or questioned. This motion was denied (pp. 37–42). Thereupon, the defendants appealed to the Circuit Court of Appeals from the order denying the motion (pp. 44–45) under the 7th section of the judiciary act of March 3, 1891 (26 Stat. 826). Upon this appeal, which thus presented only the question of jurisdiction, the Circuit Court of Appeals held that the facts shown by the bill precluded the Association from obtaining relief in any event because of the lack of power to issue an injunction, and directed that the bill be dismissed without further hearing in the

Circuit Court (pp. 68, 72). The appellant contended that if the order of the state court, although valid on its face, was shown to be utterly void for want of jurisdiction, the Circuit Court would have jurisdiction to enjoin the execution or enforcement thereof in order to prevent irreparable injury and a multitude of suits, and that such an injunction would not "stay proceedings in any court of a state" within the meaning of section 720 of the Revised Statutes. The decision of the Circuit Court of Appeals was placed upon two grounds: (1) that the order appointing the receiver was not shown to be void for want of jurisdiction in the state court (pp. 54–60); and (2) that relief in any event was prohibited by section 720 of the Revised Statutes (pp. 60–68).

It appears by the bill that in an action in the state court instituted against the Association by Phelps for the recovery of a money judgment, the Association entered a special appearance for the purpose of moving to quash two returns of summonses, purporting to show service thereof upon agents of the Association, upon the ground that the persons served were not such agents (p. 18). The state court overruled this motion, holding that the persons served were agents of the Association (p. 21). Thereafter, judgment by default having been rendered against the Association, and execution issued and returned *nulla bona* (p. 24), an order was made, without notice to the Association, appointing a receiver for the purpose of enforcing the judgment out of equitable assets beyond the reach of execution (pp. 24–26). If, as contended by appellant, the judgment was void for failure to acquire jurisdiction of the person, it is clear that the order

based upon it and made to enforce it is equally void. The principal ground of the decision below that the bill does not establish a lack of jurisdiction in the state court to render the judgment complained of, is that it shows a special appearance by the Association in that court for the purpose of challenging the jurisdiction of the person, and a decision by the court in favor of its own jurisdiction.

There is no question that the bill sufficiently avers the non-agency of the persons served with the summons (pp. 2–4). It is alleged that neither the insurance commissioner nor B. Frese upon whom service was made was an agent of the Association. As to the commissioner, it was shown that he had been appointed an agent for service of process by the Association, a New York insurance corporation, in accordance with a law of the state requiring it as a condition to the transaction of insurance business in the state (§ 631 Ky. Sts. 1899); and that this appointment had been revoked and annulled upon the subsequent exclusion of the Association from doing business in the state (p. 4). As to Frese, it was averred that he was not and never had been an agent of the Association for any purpose (p. 3). It was, however, ruled by the court below that, notwithstanding these allegations were not denied but admitted by the demurrer and motion, the fact must, nevertheless, be taken according to the state court decision. Indeed, were it not for averments showing the special appearance and the decision of the state court that the persons served were agents of the Association, the sole question would be whether execution of a personal judgment rendered by a state court without jurisdiction of the person of the

defendant can be enjoined by a federal court. If, therefore, the learned court below is in error, both as to the conclusiveness of the state court decision and the effect of section 720 of the Revised Statutes, the fact of agency can be questioned only on further hearing in the Circuit Court, to which hearing the appellant is entitled as of right and where it is prepared to litigate and establish its allegations. *Brill* v. *Peckham Motor, etc., Co.*, opinion by Mr. Chief Justice Fuller, April 6, 1903; *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28, 40.

The sufficiency of the amount in controversy to confer jurisdiction was not questioned in the opinion either of the Circuit Court (pp. 37–42) or of the Circuit Court of Appeals (pp. 49–68). The amount of the judgment in the state court sought to be collected was $2,360 (p. 4). Nor could such a doubt reasonably be entertained in view of the averments as to great and irreparable injury, largely in excess of $2,000, which would be suffered from the threatened illegal acts sought to be restrained (pp. 1–2, 5–6). In a suit for injunction, the value of the right to be protected, or the extent of the injury to be prevented, determines the value of the matter in controversy. *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28, 39; *Marshall* v. *Holmes*, 141 U. S. 589, 595; *Humes* v. *City of Ft. Smith*, 93 Fed. Rep. 857, 862; *Nashville, etc., R. Co.* v. *McConnell*, 82 Fed. Rep. 65, 73. And as the averments of the bill must now be taken as true, the jurisdiction in this respect is established. *Blackburn* v. *Portland Gold Min. Co.*, 175 U. S. 571, 574.

As to the right of the Association to equitable relief by injunction, if the order of the state court appointing the receiver is void and if the Circuit Court has power to

enjoin its execution, the necessity for equitable relief is manifest, for the invalidity of the judgment and of the order appointing a receiver does not appear upon their face, and it is clear that the injury which the Association would otherwise suffer could find no remedy in any action at law. *Arrowsmith* v. *Gleason*, 129 U. S. 86, 95, 97, 101; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497; *French* v. *Hay*, 22 Wall. 250, 252. As the returns of service of process in the Phelps case in the state court were regular upon their face, and extrinsic evidence was required to show their invalidity, a court of equity was the only tribunal which could afford effectual relief; and the only adequate relief was by injunction. *Robb* v. *Vos*, 155 U. S. 13, 38; *Marshall* v. *Holmes*, 141 U. S. 589, 595.

ASSIGNMENT OF ERRORS.

The various errors assigned are all based upon the direction of the Circuit Court of Appeals to the Circuit Court to dismiss the bill of complaint. For convenience of argument, and in view of the grounds upon which the learned Circuit Court of Appeals proceeded, the reasons for holding this direction to be error may be stated in two propositions, viz.:

(1) A Circuit Court of the United States has jurisdiction to enjoin the execution or enforcement of a judgment of a state court which is wholly void for want of jurisdiction; and

(2) Notwithstanding the decision of the state court in support of its own jurisdiction, the order appointing a receiver of appellant's property may be shown to be wholly void for want of jurisdiction of the person of appellant.

I.

The appeal to this court from the Circuit Court of Appeals was properly granted and can be maintained. It is authorized by section 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, because the jurisdiction of the Circuit Court was placed not only on diverse citizenship but also on a ground independent of that, namely, a controversy arising under the Fourteenth Amendment to the Constitution of the United States. In such cases, as has been ruled by this court, an appeal may be taken from the Circuit Court to the Circuit Court of Appeals, and thereafter the jurisdiction of this court may be invoked directly on another appeal. *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 477; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277, 280; *Huguley Manfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 295.

In the present case, the appeal to the Circuit Court of Appeals was by the defendants from an interlocutory order or decree overruling their motion to dissolve a preliminary injunction *solely on the ground that the court had no jurisdiction.* The Circuit Court of Appeals reversed this order and remanded the cause to the Circuit Court, "with directions to dissolve the injunction" (p. 49). The opinion of the Circuit Court of Appeals (to which reference may be made, *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 485), shows that that court held that section 720 of the Revised Statutes prohibited any court of the United States from issuing an injunction to restrain the enforcement or collection of a void judgment entered in a state court acting without jurisdiction, and that as no relief whatever could be obtained in this suit in a federal

court, the Circuit Court should be directed to dismiss the bill (p. 68). Thereafter, a motion for a rehearing was made, and the Circuit Court of Appeals entered a final decree reversing the order appealed from and remanding the cause to the Circuit Court "with directions to dismiss the bill of complaint" (p. 72).

II.

The controlling question on this appeal arises under section 720 of the Revised Statutes, which may be quoted for convenience, viz.:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The allegations of the bill of complaint, which under the defendant's motion must be taken as true and in the aspect most favorable to the pleader, show that relief is sought by way of injunction to restrain the defendants from enforcing the collection of a void judgment entered in a court which it is alleged had no jurisdiction of the person of the defendant in the original action, being the complainant in the present suit. The judgment is valid upon its face. Under the pretended authority of such void judgment, the defendants are taking and threatening steps which must produce great and irreparable damage to the Association and its policyholders and involve innumerable suits. The relief prayed for was an injunction directed only to the parties and enjoining them from interfering with the business and property of the complainant Association by acts of trespass.

Assuming, as is discussed under part III., that the order of the state court appointing the receiver of appellant's property was wholly void for want of jurisdiction, the so-called receiver was in truth no receiver, nor any officer of the state court, and the order was no more binding upon any one than if it had no existence. The receiver acting in execution of such an order was a mere trespasser. That such are the consequences of a total invalidity of the order is too manifest a proposition to admit of question. It was to restrain admitted acts of trespass under color of a void order, by injunction directed against the persons acting under it, that the present suit was instituted. The only result of granting the relief prayed for would be to prevent acts the doing of which would make the actors trespassers and at the same time inflict an irreparable injury on the complainant Association. The question is whether this presents the case of an injunction "to stay proceedings in any court of a State," within the prohibition of section 720 of the Revised Statutes. The appellant's position is that an injunction to restrain the commission of mere acts of trespass under assumed authority of a void order does not "stay proceedings in any court of a state," for it leaves the parties perfectly free to take any steps or to conduct any proceedings in any state court. It is submitted that to stay conceded acts of trespass is not to stay "proceedings" in court within any just meaning of the term. The learned Circuit Court of Appeals declined to give its assent to this position as involving too "narrow a construction of the term," and held that the Circuit Court had

no power to award the injunction "though the state court exceeded its jurisdiction" in making the order (p. 61).

The exact question thus presented by this appeal does not seem ever to have been decided by this court, although the right to issue the writ of injunction in analogous cases has been frequently sanctioned. The true rule would seem to be that while section 720 of the Revised Statutes prohibits an injunction "to stay proceedings in any court of a state," it does not prohibit an injunction against parties who are attempting acts of trespass under color of a void order or judgment. In such a case, not *proceedings within the jurisdiction of any state court*, but the wrongful acts of individuals are restrained. The individuals are left at liberty to proceed in any court for any relief which the state court may grant within its jurisdiction; but the moment they threaten to seize the property of a defendant, he is entitled to enjoin the process when void for want of jurisdiction and to be protected in the possession of his property if otherwise a proper case for equitable relief be made. Indeed, proceedings in a state court never deprive a party of liberty or property without due process of law; the mere entry of a judgment or order touches neither. It is the attempt at enforcement which presents the question of constitutional right and calls for protection. If then the order be void upon its face, ordinarily a defense thereto is ample at law; but if valid upon its face, as in the case at bar, equity will relieve.

This was well pointed out by Mr. Justice Brewer in *York v. Texas*, 137 U. S. 15, 20, in the following language:

> "The Fourteenth Amendment . . . forbids a State to deprive any person of life, liberty or property without due process of law. . . . But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon or the judgment is sought to be enforced that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the amendment is preserved, and there is no just cause of complaint. . . . If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity."

So, in the leading case of *Pennoyer* v. *Neff*, 95 U. S. 714, 732, it was held that a personal judgment rendered without due service of process "can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the state where rendered," that "the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them," and that "since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights

and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."

The exact question was presented in the case of *Northern Pacific Ry. Co.* v. *Kurtzman*, 82 Fed. Rep. 241, 243, under a demurrer to the bill of complaint, which, among other things, sought to restrain a threatened sale of lands under tax proceedings instituted in a state court. Hanford, D. J., delivering the opinion of the Circuit Court and overruling the demurrer, used the following language:

> "In the argument, counsel for the defendant treated the case as one in which the primary object is to enjoin proceedings to enforce a decree rendered by the superior court of the state in and for Franklin county. I recognize the absolute correctness of the proposition that the federal courts are forbidden by express provisions in the laws enacted by congress to issue injunctions to stay proceedings in any court of a state, but that principle is not applicable where the suit in the federal court is a direct attack upon a judgment rendered in a state court for the purpose of nullifying such judgment, upon the ground that the same was obtained by fraud, or because the court in which such judgment appears of record had no jurisdiction to render the same. In the exercise of their general equity powers, the circuit courts of the United States have always been free to grant relief of this nature in cases coming within their jurisdiction. *Galpin* v. *Page*, 18 Wall. 351–375; *Pennoyer* v. *Neff*, 95 U. S. 714–748; *Arrowsmith* v. *Gleason*, 129 U. S. 86–101, *Marshall* v. *Holmes*, 141 U. S. 589–601. The bill of complaint attacks the judgment of the superior court on the ground that it acted without jurisdiction in rendering the judgments."

In *Terre Haute, etc., R. Co.* v. *Peoria, etc., R. Co.*, 82 Fed. Rep. 943, 946, Grosscup, D. J., said:

"These statutes, conferring jurisdiction in all cases arising in law or in equity, where certain conditions exist, were not intended to confer merely fractional jurisdiction. The right of the federal court to take cognizance of the controversies arising in such cases, with all the remedies usually applied in law and in equity, was clearly contemplated. Section 720 could never have been intended to trench upon this grant of jurisdictional domain. Such interpretation would imply an intention on the part of congress to repeal a portion of the power expressly given to the courts, both by the constitution and the judiciary act. In their literal scope, the constitution and statutes conferring jurisdiction, and this section 720, are in conflict, and to the extent of such conflict the legal effect of the latter statute must be narrowed down. The cases cited, and a line of cases in the supreme court of the United States, of which they are a development, clearly show that this is the interpretation put upon these two apparently inconsistent lines of legislation.

But the jurisdiction of the federal circuit court is extended only to distinct cases in law or in equity, where the stated condition prevails. Power is not thereby conferred to take jurisdiction of causes pending in the state court, or phases of such causes, such as proceedings tantamount to the common-law practice of moving to set aside a judgment for irregularities, or tantamount to a writ of error or bill of review. All such causes, however independently instituted, are, in their nature, merely parts of the cause to which they are related. The courts of the United States cannot establish a right to review proceedings of the state courts by any such assumption of jurisdiction. The case over which the courts of the United States can obtain jurisdiction, and, with it, carry the right of injunction, other con-

> ditions precedent existing, must be a distinct and separate cause of action, as distinguished from a merely ancillary action."

The difference between staying proceedings in a court and restraining trespass under a void judgment or order of a court acting without jurisdiction is fundamental. Thus, the federal courts will not restrain the institution of suits in a state court under unconstitutional statutes as in *Fitts* v. *McGhee*, 172 U. S. 516, 529, or in any way interfere with proceedings therein; but it is submitted, that as soon as those proceedings ripen into an alleged judgment which judgment is void, the steps of individuals seeking to enforce it may be enjoined within the principle of *Osborn* v. *Bank of the United States*, 9 Wheat. 738, and *Smyth* v. *Ames*, 169 U. S. 466. Thus, in *Fitts* v. *McGhee*, the judgment was reversed because it restrained the *institution* or *prosecution* of *proceedings* in a state court; yet it was distinctly recognized that a different question would be presented "if the individual defendants held possession, or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights." So, too, in criminal cases, no federal court could interfere to impede or avert a threatened prosecution in a state court under an unconstitutional statute, even though it were alleged that the state court had no jurisdiction; but as soon as the proceeding ripened into judgment and no adequate appeal existed, relief would be granted under *habeas corpus*, or if property rights were involved, a court of equity could enjoin any individual or officer seeking

to enforce the void judgment. The pendency of proceedings in a state court, whether civil or criminal, does not of itself require or warrant interference by a federal court. Public policy and due regard for considerations of comity would prevent interference under general principles of justice. It cannot be assumed that a state court will not proceed according to the constitution. But, if it does proceed unto judgment without due process of law and a proper case is otherwise made for relief in equity, a federal court may restrain individuals from availing of the judgment. However anxious and solicitous the federal courts may be to avoid conflicts of jurisdiction, they cannot deny suitors due protection of their constitutional rights. As the Circuit Court of Appeals, seventh circuit, said in *Baltimore & O. R. Co.* v. *Wabash R. Co.*, 119 Fed. Rep. 678, 681, speaking through Circuit Judge Jenkins:

> "We are anxious and should strive to avoid all possible and unnecessary conflict between federal and state courts, but we are not at liberty to deny jurisdiction when it is rightly invoked."

The cases presenting the closest analogy to the present question are those brought in the federal courts for relief by way of injunction against judgments of state courts obtained by fraud and to restrain proceedings thereon. Of course, the case of a state court acting without jurisdiction must needs be infinitely stronger in favor of an injunction than a case where the state court had jurisdiction of the person and the ground of injunction was fraud in the proceedings. In these fraud cases, it has always been argued that relief by injunction could not be granted because of the prohibition contained in section 720 of

the Revised Statutes, and because of the danger of conflicts of jurisdiction; but this court has nevertheless uniformly supported the jurisdiction. Thus, in the case of *Marshall* v. *Holmes*, 141 U. S. 589, 599, Mr. Justice Harlan, speaking for the court, reviewed the authorities, and said:

> "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud."

Another class of analogous cases is where suit is brought in equity to obtain relief against judgments based upon the unauthorized appearance of attorneys, of which *French* v. *Hay*, 22 Wall. 238, 248, and *Robb* v. *Vos*, 155 U. S. 13, 38, are examples.

In the latter case, the suit was instituted in the United States Circuit Court, and objections to the jurisdiction were overruled in the following language by Mr. Justice Shiras (at p. 38):

> "As the proceedings in the Gugenheim case were regular upon their face, and extrinsic evidence was required to show their invalidity, we think a court of equity was the proper tribunal

to afford effectual relief. *Slater* v. *Maxwell*, 6 Wall. 268; *Cocks* v. *Izard*, 7 Wall. 559; *Oelrichs* v. *Spain*, 15 Wall. 211, 228; Freeman on Judgments, §§ 499 and 500.

Nor do we think that the contention, that for the Circuit Court of the United States to grant such relief would be to interfere with the jurisdiction of the state court, is well founded. *Pennoyer* v. *Neff*, 95 U. S. 714; *Johnson* v. *Waters*, 111 U. S. 640; *Arrowsmith* v. *Gleason*, 129 U. S. 86."

Where the state court is acting within the limits of its jurisdiction or its officers are enforcing its valid orders or decrees it is recognized that no federal court should impede or avert any action so taken. And the converse is equally true, that no state court should impede or avert proceedings in a federal court having jurisdiction. But where the original court is proceeding without jurisdiction, an entirely different question is presented.

The case of an injunction against acts done by authority of proceedings in a state court after jurisdiction has been transferred by a valid removal to a circuit court of the United States, is a fair illustration of appellant's position. Such proceedings are proceedings in a state court clearly to the same extent as the proceeding here in question. But neither are within the meaning of the statute, for both are without the jurisdiction of the state court. There the jurisdiction has ceased; here the jurisdiction has never existed. The decisions in this class of cases demonstrate that the statute is intended only to prohibit federal interference with state jurisdiction.

In *French* v. *Hay*, 22 Wall. 238, 248, a judgment

was obtained without service of process, the jurisdiction being based upon an unauthorized entry of appearance by an attorney. A suit to annul the judgment was instituted in the state court, and removed to a circuit court of the United States, which proceeded to annul the state court judgment for want of jurisdiction. Meanwhile, however, the judgment creditor undertook to enforce his judgment by suing thereon in another state, which proceeding, upon application of the judgment debtor, the circuit court restrained by perpetual injunction. This court affirmed the decree, held that such an injunction was not within the prohibition of the federal statute, and observed that otherwise, "the result would have shown the existence of a great defect in our federal jurisprudence, and have been a reproach upon the administration of justice" (p. 253).

In *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497, it was held that proceedings resulting in a judgment in a state court after removal of the cause to a circuit court of the United States were "absolutely null and void"; that a suit to enforce the judgment "was, therefore, but an attempt to enforce a pretended judgment of the state court, rendered in a case over which it had no jurisdiction"; and that a bill filed in the circuit court for the sole purpose of enjoining the so-called proceeding was not demurrable by reason of the statute. A decree *pro confesso* perpetuating a preliminary injunction, which was entered upon the overruling of a demurrer by the defendants, was therefore affirmed, notwithstanding the statute forbidding "a writ of injunction to stay proceedings in a state court."

As was well said by Judge Love in *Wagner* v. *Drake*, 31 Fed. Rep. 849, 851:

> "An injunction in such case by the federal court, restraining the parties before it from proceeding elsewhere, is no injunction, within the spirit and intent of the statute staying proceedings in a state court, because after removal there is no proceeding left in the state court, and no jurisdiction to be interfered with."

If it be said that these cases are distinguishable because section 720 of the Revised Statutes is limited by the Removal Act which forbids a state court to entertain jurisdiction after removal, the answer is that section 720 is also limited by that provision of the Fourteenth Amendment which forbids any state to deprive any person of property without due process of law.

The decisions which hold that replevin or injunction will not lie against an officer in possession of the property of a stranger to the proceeding, at the suit of such stranger, are entirely consistent with the proposition that the property owner may maintain a suit to protect it against any person who assumes to act under void process; for in each case of the former class the process was concededly valid, and the only question was as to the ownership of property affected by it,—a question which must of necessity have been left to the untrammelled discretion of the officer in the first instance, after which the property in his possession must necessarily have come into the possession of the court and the question of its ownership within the court's jurisdiction to determine. But the officer can have no discretion or power whatever to act under avoid process, and a court can take possession only by virtue of

process within its jurisdiction. The cases establishing the doctrine of non-interference with possession under valid process (*e. g.*, *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334), were reviewed and distinguished in *Kern* v. *Huidekoper*, 103 U. S. 485, 491, 493, and the court, by Mr. Justice Woods, said:

> "After the filing in the United States Circuit Court, on July 27, 1877, of the record of the proceedings in the State court, the latter lost all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment were not, as some of the state courts have ruled, simply erroneous, but absolutely void."

In *Gumbel* v. *Pitkin*, 124 U. S. 131, 146, the court recognized this distinction and upheld the power of a state court to disregard the process of a federal court which was void because issued and executed on Sunday, and the right of a state sheriff to levy upon and take possession of property in the hands of a United States marshal thereunder, saying—

> "It was illegal in the marshal to have taken possession of the goods under the writs in his hands issued on Sunday. It was his duty, when the sheriff appeared with a lawful writ from the state court, to surrender possession to him."

Very clearly, this being the marshal's duty, the property could not have been considered in the custody of the court according to the rule preventing interference with such court, for otherwise his plain duty would have been not to surrender possession, except upon order of the court under whose authority he assumed to act, but to resist by force the attempt of the state officer to take the property from him. There was, however, no conflict of

jurisdiction, because there was no jurisdiction on the part of the marshal. There was no clashing of state and federal courts, because no federal court was concerned in the issuance and execution of this void process. In such a case, it should be assumed that the federal courts would not uphold the void process.

Upon similar ground, it has been held that where the case shows an admitted abuse of process, this may be enjoined, though the validity of the judgment upon which it is based be not attacked. Thus, in *Julian* v. *Central Trust Co.*, 115 Fed. Rep. 956, 962, the Circuit Court of Appeals for the fourth circuit sustained an injunction against an admitted abuse of state process by a state officer under valid judgments, and by Judge Simonton said:

> "We do not sit to review these judgments, nor have we the right to do so. The case made shows that Julian, the sheriff, is attempting to sell, for the satisfaction of judgments against the Western North Carolina Railroad Company, property in which that company has no interest or estate whatsoever. He has been enjoined, not from or because of the use of process, but because of the abuse of process. When he seeks to subject the property of the Southern Railway Company, by levying upon it under a judgment to which it was not a party, for the payment of the judgment against the Western North Carolina Railroad Company, he goes outside of his official duty, and becomes a bald trespasser."

Other cases, in which interference by injunction or otherwise have been held improper, are not inconsistent with the position that there can be no interference with jurisdiction where jurisdiction is shown not to exist.

In *Shields* v. *Coleman*, 157 U. S. 168, 182, it was

held that a circuit court of the United States had no right to appoint a receiver with power to take possession of property in the possession of a receiver appointed by a state court. It was objected that the appointment by the state court was void because without jurisdiction, but this court on looking into the record and noticing the provisions of the state law, was constrained to "assume" that the "order was valid" and "authorized by the laws and practice of the state," in the absence of an affirmative showing to the contrary. Manifestly, an opposite conclusion would have resulted had the record certainly shown the appointment to be void for want of jurisdiction.

In *Central Nat. Bank* v. *Stevens*, 169 U. S. 432, it was held that a state court had no power to enjoin certain proceedings in a circuit court of the United States, and it was conceded that the necessity for this rule would not apply in a case of an injunction against a proceeding which might be avoided on account of fraud or a mistake of facts or imposition on the court. The court, by Mr. Justice Shiras, referring to the principle permitting a federal injunction against the enforcement in a state court of a judgment obtained by fraud, said (p. 464):

> "In the present case, no fraud of any kind is imputed to the plaintiffs in the Circuit Court of the United States, nor is it alleged that the action or proceedings in that court were founded in any mistake of facts, or were influenced by any misrepresentation or fraud practised upon the court. But the purpose of this suit was to practically nullify the proceedings in the Circuit Court, and to enjoin the suitors therein from pursuing their

> remedy in that court, not for any fraud of theirs used in promoting their cause, but for the alleged fraud of other parties in another court, and in a case in which these appellants were not parties."

In *Simpson* v. *Ward*, 80 Fed. Rep. 561, application was made to a circuit court for an injunction against a receiver appointed by a state court, on the ground that the appointment was wholly void, the court being without jurisdiction. The application was denied by Judge Lacombe, not because of section 720 of the Revised Statutes, which was referred to, but because there was an adequate remedy at law, it appearing that a denial of an injunction would be followed by no irreparable injury.

So far as a careful examination of the reports has disclosed, it has never been held in any case that an injunction restraining acts of trespass under a concededly void judgment would be equivalent to restraining proceedings in a court.

One of the arguments of the learned Circuit Court of Appeals was that, in order to determine the invalidity of and give relief against a state court order alleged to be void for want of jurisdiction, it would be necessary to exercise an "appellate or revisory jurisdiction over that court" (p. 54). This argument was advanced and fully answered by this court in some of the above cases. In *Johnson* v. *Waters*, 111 U. S. 640, 667, the following statement was made, and in *Marshall* v. *Holmes*, 141 U. S. 589, 599, it was quoted with approval, viz.:

> "In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court."

The fact, if it be a fact, that relief could have been obtained in some state court, does not in the slightest degree affect the right to obtain the same relief in the Circuit Court of the United States where the requisite jurisdictional facts are present, as in the case at bar. Thus, in *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98, upholding the federal power to annul deeds made under authority of a state court order obtained by fraud and imposition, the court, by Mr. Justice Harlan, said:

> "If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity, as administered in the courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs being in excess of the amount required for the original jurisdiction of such courts."

It appears, however, that the courts in Kentucky are prohibited by statute (Civil Code, § 285) from enjoining the execution of a judgment of another court of the state, though the judgment be concededly void. *Jacobson* v. *Wernert*, 19 Ky. L. R. 662–663. So that in a case like the one at bar, where an injunction is necessary to prevent irreparable injury, no relief could be had except in a federal court. That the courts of the United States are not bound by such a statute limiting the powers of the state courts cannot be doubted.

Barrow v. *Hunton*, 99 U. S. 80, 82, 83, 85; *Marshall* v. *Holmes*, 141 U. S. 590, 598.

Likewise, an appeal from the order in question would have afforded no relief, for the very statute allowing such appeal provides "that such order shall not be superseded" (Civil Code, § 298). So that even if successful on appeal, the irreparable injury set forth in the bill (pp. 5–6), would have been accomplished and the Association would be without remedy.

The principal argument by which the learned Circuit Court of Appeals supports its decision is based on the assumption that a granting of the relief prayed for would create a conflict of jurisdiction between a state court and a circuit court of the United States, a situation which it was the intention of section 720 of the Revised Statutes to avoid. In this there is a fundamental error, and it lies in an oversight of the simple truth that an injunction against the enforcement of a judgment rendered without jurisdiction is not directed against the exercise of jurisdiction, and therefore cannot possibly involve a conflict of jurisdiction in the true sense. There is no valid pending proceeding in the state court, and, therefore, there is properly no jurisdiction to be interfered with. *Wagner* v. *Drake*, 31 Fed. Rep. 849, 851. It surely cannot be that all possible conflict between state and federal powers must be avoided at any cost. It may well be that the right rule of action in all cases would prevent all conflicts of jurisdiction; but *jurisdiction* must be taken to mean jurisdiction exercised within the limits of *due process of law*, not the exercise of mere physical power under pretended authority of *void process*. It

is fair to assume that courts will not as a rule sanction or uphold a void process; but courts have been known to do this, and in every such case there has been an exercise of mere physical power, not of jurisdiction, and, therefore, there was not a judicial proceeding within the meaning of section 720 of the Revised Statutes. In each of the cases before cited, where void or pretended proceedings in state courts were enjoined or disregarded in the federal courts, there was involved a possible conflict of powers, but in none of them was there involved a conflict of jurisdiction. In the numerous cases of judgments obtained by fraud or through unauthorized appearances and in the *habeas corpus* cases, conflict of powers may exist and is unavoidable. It is true that the jurisdiction is to be exercised with caution; but it is clearly the duty of the court to do so in a case properly presenting the issue. Says the learned Circuit Court of Appeals: "Unless one court or the other shall yield its pretensions, nothing remains but an appeal to force"; and the question is asked: "Which court shall the receiver obey" (p. 61)? This same argument would have applied to many cases sustained by this court; and the answer is obvious. It is not to be supposed that state courts generally will make pretensions involving the enforcement of a void order or judgment; nor is it to be supposed that the state court in this case will not yield its pretensions if the decision of this court shall be in favor of the injunction. In the language of this court in the leading case of *French* v. *Hay*, 22 Wall. 250, 253:

> "If the state courts should persist in proceeding—a thing not to be expected—the wrong

will be on the part of those tribunals and not of the court below."

III.

The questions of fact upon which the agency of the persons served with process may ultimately depend, in view of the positive averments of non-agency in the bill, should be left to a hearing on the merits, particularly in view of the fact that the grounds of the defendant's motion were confined to the effect of section 720 and the amount involved, and there was no suggestion that it appeared that due service had been had in the state court (p. 44). If such a point had been made, the complainant might have adduced additional proof, or amended the bill.

Before analyzing the questions of fact, it will be necessary to consider an objection which, if tenable, would preclude further discussion. This objection may be stated in the language of the Circuit Court of Appeals, as follows (pp. 54–55):

> " Having appeared for the purpose of challenging the jurisdiction of the court, the decision of the court upon that issue is conclusive, until annulled or reversed by some court having jurisdiction to revise and correct error.
>
> However erroneous the conclusions of the Jefferson circuit court may have been, and we intimate nothing in that respect, its judgment is certainly not void, and in a proceeding of this kind we must accept it as a valid and legal judgment, for neither the circuit court nor this court have any character of appellate or revisory jurisdiction over that court. The question is not one of waiver of personal jurisdiction by an appearance solely for the purpose of contesting that jurisdiction, but of the effect and force, in a

> collateral attack, of a judgment upon an issue involving the jurisdiction of the court over the person of a defendant, to which issue the present appellant was a party. The court below was, therefore, right in assuming the validity of the judgment which was the foundation for the subsequent proceedings which led to the injunction here involved."

It will at once occur to the court that in every case of a special appearance for the purpose of contesting the jurisdiction of a court, an issue is necessarily raised as to the existence of a state of facts warranting the exercise of jurisdiction; yet, since the case of *Harkness* v. *Hyde*, 98 U. S. 476, 479, it has been the settled doctrine of this court that a defendant does not waive or lose any right by a special appearance for the purpose of calling the attention of the court to the fact that it is proceeding without jurisdiction. *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 209; *Goldey* v. *Morning News*, 156 U. S. 518, 526. It should be noted that there is no statute or rule of practice in Kentucky to the effect that an appearance for the purpose of objecting to jurisdiction constitutes a voluntary general appearance, as was the case in *York* v. *Texas*, 137 U S. 15, 20, and *Kauffman* v. *Wootters*, 138 U. S. 285, 287.

The rule established by the decisions of the highest court in Kentucky is that a defendant may appear specially for the purpose of challenging the jurisdiction of the person without thereby submitting himself to the jurisdiction of the court. *Sun Mut. Ins. Co.* v. *Crist*, 19 Ky. L. R. 305, 306; *Newport News, etc., Co.* v. *Thomas*, 96 Ky. 613, 615; *Chesapeake, etc., R. Co.* v. *Heath*, 87 Ky. 651, 659; *Maude* v. *Rodes*, 4 Dana, 144, 147.

In this respect, the rule in Kentucky is in accord with the universal rule sanctioned by the decisions of this court. But, in Kentucky, an appeal cannot be taken from an adverse ruling on the question of jurisdiction without entering a general appearance. *Chesapeake, etc., R. Co.* v. *Heath*, and *Maude* v. *Rodes, supra.* In the *Heath* case, *Harkness* v. *Hyde*, 98 U. S. 476, was cited with approval, and the court further said that it was the duty of a defendant having notice of an insufficient service to apprise the court thereof, and that a failure to do so would be "strong presumptive evidence," upon collateral attack, "of the legality of the service." In that case the judgment was reversed on the question raised by the special appearance, and, remanding the case for a new trial, the insufficiency of the service was held to have been waived and a general appearance entered by the appeal. It will thus be seen that a defendant cannot appeal without abandoning the right of challenging the jurisdiction of the court, and that appeal therefore constitutes no remedy in any fair sense.

If there was no waiver by the special appearance, the next question is whether the ruling of the state court in determining its own jurisdiction is conclusive and not subject to attack in a direct proceeding to set aside the judgment or enjoin its enforcement. The authorities fully answer this question in the negative.

Thus in *Rose* v. *Himely*, 4 Cranch, 241, 268, Chief Justice Marshall said :

> "The court pronouncing the sentence, of necessity decided in favor of its jurisdiction, and if the decision was erroneous, that error, it is said, ought to be corrected by the superior

> tribunals of its own country, not by those of a foreign country.
>
> This proposition certainly cannot be admitted in its full extent. A sentence, professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever."

In *Elliott* v. *Peirsol*, 1 Pet. 328, 340, speaking with respect to a collateral attack upon a Kentucky judgment in the Circuit Court of the United States for the district of Kentucky, the court, by Mr. Justice Trimble, said:

> "It is argued, that the Circuit Court of the United States had no authority to question the jurisdiction of the County Court of Woodford county; and that its proceedings were conclusive upon the matter, whether erroneous or not.
>
> We agree, that if the County Court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition, that the jurisdiction of the County Court could not be questioned, when its proceedings were brought, collaterally, before the Circuit Court. We know nothing in the organization of the Circuit Courts of the Union, which can contradistinguish them from other courts, in this respect.
>
> Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justifica-

tion; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers."

In *Harris* v. *Hardeman*, 14 How. 334, 341, the court, by Mr. Justice Daniel, quoted with approval from the case of *Starbuck* v. *Murray*, 5 Wend. 148, 158, as follows:

> "For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is, in truth, no record. If the defendant had not proper notice of, and did not appear to, the original action, all the State courts, with one exception, agree in opinion, that the paper introduced as to him, is no record, but, if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense, by a process of reasoning that, to my mind, is little less than sophistry. The plaintiffs, in effect, declare to the defendant—the paper declared on is a record, because it says you appeared; and you appeared, because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction."

In *Thompson* v. *Whitman*, 18 Wall. 457, 468, the precise point involved was the right to introduce evidence in a circuit court of the United States to contradict the record of a state court judgment "as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court," and it was "admitted that no decision

had ever been made on the precise point." But the court was unable to distinguish a case relating to the impeachment of jurisdictional facts "stated to have been passed upon by the court," from those cases in which had been recognized the right to impeach by evidence *aliunde* the record of any judgment on the ground of lack of jurisdiction—citing *Harris* v. *Hardeman*, 14 How. 334, 341; *Elliot* v. *Peirsol*, 1 Pet. 328, 340, and *Rose* v. *Himely*, 4 Cranch, 241, 269.

The cases of *Cooper* v. *Newell*, 173 U. S. 555, 565; *Robb* v. *Vos*, 155 U. S. 13, 38, and *French* v. *Hay*, 22 Wall. 238, 243, 252, establish the right of circuit courts to prevent the execution of a judgment of a state court based upon entry of appearance by an attorney assuming to represent the defendant, but which can be shown to be void by evidence that the attorney acted without authority.

In the *Cooper* case, Mr. Chief Justice Fuller, speaking for the court, cited as a leading case *Thompson* v. *Whitman*, 18 Wall. 457, as establishing—

> "that 'the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist;' and that 'want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing.' . . .
>
> The courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several States as between each other. And the courts of the United States are

bound to give to the judgment of the state courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States.

The same rule applies to each, and the question of jurisdiction is open to inquiry even when the judgment of the court of a State comes under consideration in a court of the United States, sitting in the same State. *Christmas* v. *Russell*, 5 Wall. 290; *Galpin* v. *Page*, 18 Wall. 350; *Pennoyer* v. *Neff*, 95 U. S. 714; *Hart* v. *Sansom*, 110 U. S. 151; *Goldey* v. *Morning News*, 156 U. S. 518."

A striking illustration of the error in holding that the state court's determination in favor of its own jurisdiction is conclusive in the circuit court, is to be found in those cases wherein state courts have assumed to decide that they have not lost jurisdiction by an attempted removal, the removal papers being, however, sufficient according to the view of the federal court. In such a case, the decision of the state court in favor of its jurisdiction is regarded as a usurpation, and, being without jurisdiction, its subsequent proceedings and judgment are not simply erroneous, but wholly void. *Gordon* v. *Longest*, 16 Pet. 97, 104; *Insurance Co.* v. *Dunn*, 19 Wall. 214, 224; *Removal Cases*, 100 U. S. 457, 475; *Railroad Co.* v. *Mississippi*, 102 U. S. 135; *Kern* v. *Huidekoper*, 103 U. S. 485, 492. It is because they are wholly void and not simply erroneous, that they are subject to collateral attack in the federal courts, and, if need be, to injunction. *French* v. *Hay*, 22 Wall. 238, 250, 252; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497.

(1.) As to the insurance commissioner, it appeared that he had been appointed agent for service of process

on May 10, 1893 (pp. 34–35), in compliance with section 631 of the Kentucky statutes, which reads as follows:

> "§ 631. Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this State, in any federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

The appointment was as follows (pp. 34–35):

> "KNOW ALL MEN BY THESE PRESENTS:
>
> At a meeting of the board of directors of the Mutual Reserve Fund Life Association Insurance Company, of the city of New York, in the state of New York, held in the office of the company in said city, on the 10th day of May, 1893, the following resolution was adopted:
>
> '*Resolved*, That the Mutual Reserve Fund Life Association Insurance Company of the city of New York, in the state of New York, having been admitted or having applied for admission to transact business in the state of Kentucky, in conformity with the laws thereof, does hereby

consent that service of process upon any and every agent that is now or may hereafter be acting for said company in Kentucky, or upon the insurance commissioner of said state, shall be valid service upon said company in any action or special proceedings against said company in the state of Kentucky subject to and in accordance with all the provisions of the statutes and laws of said state of Kentucky, now in force, and such other acts as may be hereafter passed amendatory thereof and supplementary thereto. And said agent, or said insurance commissioner, are hereby duly authorized and empowered to acknowledge service or process for and in behalf of said company in the state of Kentucky, in all cases as provided for by the laws of the state of Kentucky, and service of process, mesne or final, upon said agent, or said insurance commissioner, shall be taken and held to be as valid as if served upon said company, according to the laws of this or any other state, hereby waiving all claims or writ of error by reason of such acknowledgment or service; and service of process upon such agents, or such insurance commissioner in any county of this state, shall be deemed good and valid, and authorize trial of the cause in the court whence such process issued.'

In witness whereof, the said company has to these presents affixed its corporate seal, and caused the same to be subscribed and attested by the second vice-president and secretary, at the city of New York, in the state of New York, on the 10th day of May, A. D. 1893.

[SEAL.]

HENRY J. REINMUND,
2d Vice-President.

F. T. BRAMAN,
Secretary."

On October 10, 1899, the insurance commissioner, acting under authority conferred upon him by the laws of Kentucky, promulgated an order revoking the

authority of the Association and its agents to do business in the state as follows (p. 35):

> "OFFICE OF INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.
>
> FRANKFORT, KY., October 10, 1899.
>
> Notice is hereby given that from and after this date, all authority granted by this department to the Mutual Reserve Fund Life Association, of New York, a corporation organized under and existing by authority of the laws of the State of New York, together with all licenses issued by this department to agents of the above named association, is revoked.
>
> (Signed) W. H. STONE,
> Insurance Commissioner."

On the same day notice of this action was given to the Association by the following letter (pp. 35–36):

> "STATE OF KENTUCKY:
> OFFICE OF COMMISSIONER OF INSURANCE,
> FRANKFORT, October 10, 1899.
>
> CHARLES W. CAMP,
> Secretary of the Mutual Reserve Fund
> Life Association, New York City.
>
> DEAR SIR:
>
> I have this day revoked all licenses to agents of your association in this State, as your certificate of authority was not renewed when it expired June last. Your company has no authority now to transact business in Kentucky.
>
> Very truly yours,
> W. H. STONE,
> Insurance Commissioner."

Thereupon, and long prior to the service of the summons in question, the Association withdrew all of its agents from the state, and, at the time of the service in question, had no agent of any kind within the state (pp. 2–4, 18–19). Therefore, the only theory upon which it could be concluded that the insurance commissioner was

an agent of the Association for service of process would be that the authorization which made him such agent continued after the exclusion of the Association from the state, as was held in December, 1900, by the Court of Appeals of Kentucky in *Home Ben. Soc.* v. *Muehl*, 59 S. W. Rep. 520, 521. It is submitted that the authority of the commissioner to represent the Association did not continue after its exclusion from the state. The authority for service on the commissioner was given only as a condition precedent to the transaction of business by the Association within the state. The commissioner was not an agent of the Association for any purpose connected with its business, but for this special purpose only. The authority so given rests wholly upon the statute requiring it, and cannot be extended beyond the requirements of the statute. The statute required as a condition of coming into the state for the purpose of doing insurance business that the Association consent to service of process upon the insurance commissioner; but it did not require this appointment of the insurance commissioner to extend to a time when these privileges should be taken away and denied, and by no fair construction can the terms of the statute and the pursuant appointment be so extended, as held in the *Muehl* case. Before the time of the service in question, the privileges and licenses granted to the Association had been revoked by the state, every agent had been withdrawn from the state, and the appointment of the commissioner had been revoked by the Association (pp. 2–4, 18–19). It was bound by the revocation of authority by the state and compelled to withdraw. If this express revocation by the Associa-

tion be not given effect, we have here a situation wherein a foreign corporation is brought within the jurisdiction of a state court by service of process upon a person acting as agent of the corporation by authority of the state alone and not by authority of the corporation, but whose authority the corporation has withdrawn. Such a result would not differ in principle from the case of proceedings against a foreign corporation based upon service of process on one who had never been authorized to represent the corporation within the state. The mere fact that the state court, in a case decided after the appointment, has held that the agency continued, does not affect the right or duty of the federal court to determine whether the corporation was or was not actually served within the jurisdiction. Otherwise, the state courts could in such cases determine conclusively their own jurisdiction under the pretence of construing a statute. *Swann* v. *Mutual Res. Fund L. Assn.*, 100 Fed. Rep. 922, 925, 928; *Friedmann* v. *Empire L. Ins. Co.*, 101 Fed. Rep. 535, 536-539; *Mutual Res. Fund L. Assn.* v. *Boyer*, 62 Kan. 31, 37-42; *St. Clair* v. *Cox*, 106 U. S. 350, 353.

The inquiry whether a state court acquires jurisdiction of the person of the defendant is essentially a federal question, upon which the decision of a state court is clearly not conclusive (*Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 609), any more than it would be in the case of the construction of a contract created by statute.

(2.) As to the agency of Frese, it was shown by uncontradicted allegation and affidavit that Frese was not and never had been an agent of the Association for

any purpose (pp. 3, 18–19, 33–36). It was also shown that the authority of every agent of the Association in Kentucky, including Frese, was revoked long prior to the service in question (pp. 18, 33–36). Indeed, this was affirmatively and positively shown by Phelps himself in his so-called amended and supplemental petition upon which the order of receivership was predicated (p. 24). This showing was made by Phelps in connection with an allegation of fraud which the Association never had an opportunity to meet. Evidently realizing that there was nothing in the record of the proceedings before the state court to contradict its positive showing as to the non-agency of Frese and the insurance commissioner, Phelps alleged for the first time in his so-called amended and supplemental petition that the withdrawal of the Association from the state and the revocation of authority of all its agents were acts done pursuant to a scheme to defraud its policyholders (pp. 24–25). Immediately upon the filing of this anomalous paper, the obnoxious order was made. Had such an allegation been before the state court on the motion to quash, and had the court found as a fact upon evidence that the withdrawal of the Association and its agents from the state was a mere fraudulent pretense and that the agencies still existed, there would be reason for holding that the determination of the state court as to the agency was not at least a usurpation of jurisdiction. But there was nothing of the kind. The Association was condemned unheard when the receivership order was entered. The same positive showing of non-agency was made before the Circuit Court by the Association in its bill, and no counter-showing of

any fraudulent scheme to render the withdrawal and revocation unavailing was attempted by Phelps or his receiver, but, abandoning this position, they saw fit to take such steps as to establish the truth of the averments of the bill. They confined their motion to the point of jurisdiction and conceded the facts. The reason for this is not far to seek. There was no gainsaying the insurance commissioner's own certificate showing that the reason for the Association's withdrawal was its exclusion by the state, and the reason for the revocation of authority of agents was the revocation of their licenses by the state (pp. 35–36). Surely, it was justifiable to revoke the authority of agents who could no longer do any business for the Association without violating the laws of the state. The only pretence that Frese had ever been its agent was in the fact that he countersigned receipts for assessments which could only properly be done by a local treasurer (p. 20). But the explanation of this was clearly shown. He was cashier of the Western Bank of Louisville, which had been appointed local treasurer for the sole purpose of transmitting money, and the receipts were countersigned by the bank through him, its cashier (pp. 34, 36). Certainly such a signing of receipts could not be any evidence of his agency; although, had service been made on the bank, a different question might have arisen. The service upon Frese, therefore, was no more binding on the Association than if no process whatever had been served upon any one, and all of the subsequent proceedings based thereon were *coram non judice*, within the cases before cited.

There is nothing in the case of *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, which militates against this position. That was a case of service upon an admitted agent of a foreign insurance corporation while he was within the state engaged in the business of the company, and it was held that this was binding on the corporation, although it had ceased to solicit new business in the state, and had previously withdrawn its agents therefrom.

But aside from the question of agency and the conclusiveness of the decision thereof by the state court, the receivership order made without notice to the defendant was void for want of jurisdiction, because such appointment could only be made *pendente lite*, and no action was pending when the appointment was made. The precise question of the right to appoint a receiver in execution of a final judgment without again bringing the judgment debtor into court has never been before the Kentucky Court of Appeals, probably for the reason that the question is governed by statutory provisions which are too plain to admit of serious question. The authority to appoint receivers is contained in sections 298 and 218 of the Civil Code. The provision of section 298 is that a receiver may be appointed in certain cases "to take charge of the property or fund during the pendency of the action"; and section 218 provides that "the court in which the action is pending" may appoint a receiver to take charge of attached property. This language is too clear for comment. The words "during the pendency of the action" and "in which the action is pending" cannot by any possibility be made to mean "after final judgment." There was not, nor could there

be, any pretense of authority to appoint a receiver in aid of the ordinary writ of *fieri facias* under section 1650 of the Kentucky Statute in execution of a money judgment. The learned court below ruled, however, that the receivership was a case of an "equitable attachment" as authorized by sections 439 and 441 of the Civil Code after a return *nulla bona* of a writ of execution, this being the only method of reaching equitable assets such as in the case at bar in execution of a judgment in Kentucky. *Davidson* v. *Simmons*, 11 Bush, 330, 333. But a simple inspection of these sections shows the error of this ruling. No mention is therein made of a receiver, and, even if it be true that an authority to attach embraces authority to appoint a receiver, the attachment here authorized is only in case an action has been instituted for that purpose. Section 439 provides that the judgment creditor, after return of execution *nulla bona*, "may *institute an equitable action* for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment"; and section 441 provides that, "*in such action* the plaintiff may have an attachment." Moreover, the learned court seems to have overlooked section 70 of the civil code, which requires the action authorized by section 439 to be brought by summons as a requisite to jurisdiction (*Caldwell* v. *Deposit Bank of Eminence*, 58 S. W. 589, 590; *McCallister's Adm'r* v. *Savings Bank*, 80 Ky. 684, 685–686); and also section 39, which prescribes that an action cannot be commenced without "causing a summons to be issued, or a warning order to be made thereon." Any

proceeding without such summons or warning order whenever required, such as an attachment under section 218, is utterly void for want of jurisdiction. *Brownfield* v. *Dyer*, 7 Bush. 505, 508; *Hall* v. *Crogan*, 78 Ky. 11; *Kelly* v. *Stanley*, 86 Ky. 240; *Redwine* v. *Underwood*, 101 Ky. 191.

If it be argued that the action of the state court in entertaining the application for a receiver in execution of the judgment amounted in effect to a reopening of the case in which jurisdiction had been previously acquired, the answer is that the state court had no power under the law of its creation to set aside the judgment and reopen the case, inasmuch as more than sixty days had elapsed since its rendition without any proceedings having been taken for its vacation (p. 22). The Circuit Court of Jefferson County, in which these proceedings occurred, has no stated terms like the ordinary Circuit Courts, but is one of the courts known as "Circuit Courts having Continuous Sessions" (Ky. Sts. 1899, § 965), as to which it is provided that "The Court shall have control over its judgments for sixty days, as Circuit Courts have over their judgments during the term in which they are rendered" (§ 988). The effect of this provision is equivalent to fixing a term during which each judgment is rendered 60 days before its close, and limits the power of the court to reopen the judgment for further litigation to that period. *Louisville, etc., Lime Co.* v. *Kerr*, 78 Ky. 12. At the end of the term at which a judgment is rendered, except as to a proceeding taken during the term, all power of the court to reopen the case ceases, and thereafter the judgment can be set aside only by the institution of a

new suit attacking it for inherent invalidity. The court which rendered the judgment has then no more control over the case, for the purpose of further litigation, than it would have over a case in another court. All it can do, aside from the correction of mere clerical errors, or as expressly empowered by statute, is to issue such process for the execution and satisfaction of the judgment as the law provides. Any action in such a case, which necessarily amounts to or requires a reopening of the case, taken without notice to the party injuriously affected thereby, is *coram non judice* and utterly void. These are fundamental principles of universal application, which have received the sanction of this court and of the highest court of Kentucky. When Phelps offered his "amended and supplemental petition" 60 days after the rendition of the judgment, there was presented the precise question so often passed upon by this court in cases of petitions for rehearing at a succeeding term to that of the decision, and the learned state court might well have decided, in the language of Chief Justice Waite in *Brooks* v. *Railroad Co.*, 102 U. S. 107, where, denying a rehearing, it was said:

> "At the end of the term the parties are discharged from further attendance on all causes decided and we have no power to bring them back."

In *Müller* v. *Ehlers*, 91 U. S. 249, 250, declining to consider a bill of exceptions signed and filed at a term succeeding the judgment, the court said:

> "Upon the adjournment for the term, the parties were out of court, and the litigation there was at an end. The plaintiff was dis-

> charged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of the date of the trial, was a nullity."

In *City of Manning* v. *German Ins. Co.*, 107 Fed. Rep. 52, the Circuit Court of Appeals, eighth circuit, while recognizing the rule that, ordinarily, the granting of a new trial is discretionary and therefore cannot be reviewed, nevertheless reversed such an order upon a motion made at a term succeeding the judgment, and, by Judge Sanborn, said (p. 56):

> "The result was that the term ended. The control of the circuit court over its judgment ceased. The successful party was discharged from further attendance and all the subsequent proceedings without his consent were *coram non judice* and void."

In *Elder* v. *Richmond, etc., Min. Co.*, 58 Fed. Rep. 536, a state court had set aside its judgment and rendered another after the expiration of a period fixed by statute, as in the case at bar, during which the court retained control over its judgments. The Circuit Court of Appeals, eighth circuit, affirmed a decree of a circuit court of the United States granting equitable relief against the latter judgment, because, as Judge Caldwell said (p. 540):

> "The action of the court . . . was not merely erroneous, but was absolutely void for want of jurisdiction. . . . It could neither vacate the first judgment nor render a new one. The judgment of every court acting without jurisdiction is a nullity, and will be so held and treated in all courts in which it is sought to be used or relied on as a valid judgment."

In *Van Dorn* v. *Pennsylvania R. Co.*, 93 Fed. Rep. 260, 261, the Circuit Court of Appeals, third circuit, ruled that the court below under the state laws had no power to reopen a judgment and permit an amendment to be filed at an ensuing term, and, by Judge Bradford, said (p. 271):

> "We have no doubt that the court below had power to grant the application to amend and should have granted it, if made at the proper time. . . . The granting of it would have involved the opening of the judgment on the demurrer. The term during which that judgment was rendered had theretofore expired and the court below was consequently powerless to allow the proposed amendment."

See also *Sibbald* v. *United States*, 12 Pet. 488, 492; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Phillips* v. *Negley*, 117 U. S. 665, 672; *Hickman* v. *Ft. Scott*, 141 U. S. 415, 418; *Morgan's, etc., S. S. Co.* v. *Texas, etc., Ry. Co.*, 32 Fed. Rep. 525, 530; *McGregor* v. *Vermont L. & T. Co.* (C. C. A., 9th circuit), 104 Fed. Rep. 709, 710; *United States* v. *1,621 Pounds of Fur Clippings* (C. C. A., 2nd circuit), 106 Fed. Rep. 161, 163; *Reynolds* v. *Manhattan Trust Co.* (C. C. A., 8th circuit), 109 Fed. Rep. 97, 98.

So, in Kentucky, the decisions of the Court of Appeals leave no room for doubt that the filing of amended or other pleadings after judgment necessarily requires reopening the case and setting aside the judgment; that otherwise, they are wholly ineffectual for any purpose (*Brown* v. *Vancleave*, 86 Ky. 381; *Meadows* v. *Goff*, 90 Ky. 540); and that, after the term, the court is without power to set aside the judgment or reopen the case, except as permitted by statute. The statute con-

trolling this point expressly declares that "The court in which a judgment has been rendered shall have power after the expiration of the term, to vacate or modify it" for the reasons specified (Civil Code, § 518). Ten grounds are named. The first three grounds may be acted on without notice, namely: A motion for a new trial, which must have been made during the term and within three days of the judgment (§ 342); an application of a defendant constructively served (§ 414), and "misprisions of the clerk" (§ 518). All the other grounds require the institution of a new suit "by petition" and "on the petition the proceedings shall be the same as those in the action in which the judgment was rendered" (§ 520). That the power in question does not exist except as exercised in accordance with this statute, has long been settled law in Kentucky.

In *Anderson* v. *Anderson*, 18 B. Mon. 95, 98, the court, by Judge Stites, said:

> "The circuit court cannot, after the expiration of the term at which a final order or judgment is entered, vacate, modify or reverse such judgment or order, except upon the grounds enumerated in section 579 [now sec. 518]."

To the same effect are *Hocker* v. *Gentry*, 3 Met. 463, 469; *Scott* v. *Scott's Ex'r*, 9 Bush. 174, 176; *Coffey* v. *Proctor Coal Co.*, 14 Ky. L. R. 415, 416; *Louisville, etc., Lime Co.* v. *Kerr*, 78 Ky. 12, 14; *Maddox's Ex'r* v. *Williams*, 87 Ky. 147.

In *Louisville, etc., Lime Co.* v. *Kerr*, 78 Ky. 12, was considered a statute relating to the power of the Jefferson Court of Common Pleas for sixty days after its judgments, which statute, as afterwards made applicable to

the Circuit Court of Jefferson County, is the statute here in question (Ky. Sts. 1899, §§ 965, 988). Holding that the trial court had no power to grant a new trial upon a motion made after the expiration of the sixty days, the court, by Judge Coper, said (p. 14):

> "It is true, the Court, having power over its judgments and orders during the term, or, in the case of the Jefferson Court of Common Pleas, for sixty days, has power within that time to set aside an order overruling a motion for a new trial; but that power of the Court cannot be extended beyond the period limited by the mere entry within the time of a motion to set aside the order refusing a new trial. Such practice is not only unauthorized by anything in the Code or in the act relating to the Common Pleas Court, but is contrary to the recognized rules of practice prior to the Code, and would be calculated to seriously embarrass both courts and litigants. If the courts have power to entertain such motions, it would seem to follow that parties have a right to make them, and to concede this is to render litigation practically interminable.
>
> There is no authority for a motion to rehear a motion for a new trial, and consequently such a motion cannot enlarge the period during which the Court has power over its orders, and *the order granting a new trial was void.*"

Under the law administered in Kentucky, according to its Court of Appeals, a judgment which is void is binding upon nobody and may be resisted anywhere, not only in the court in which it was rendered and on appeal therefrom but collaterally in any court of general jurisdiction. *Spencer* v. *Parsons*, 89 Ky. 577, 580; *Stevens* v. *Deering*, 10 Ky. L. R. 393, 394. Although, in Kentucky, contrary to the

general rule, an execution of a void judgment by a state court other than that wherein the judgment was rendered is forbidden by statute. *Jacobson* v. *Wernert*, 19 Ky. L. R. 662–663.

There is nothing inharmonious with these principles in the cases cited by the learned Circuit Court of Appeals to the effect that jurisdiction of a court continues until its judgment is satisfied (*e. g.*, *Wayman* v. *Southard*, 10 Wheat. 1; *Riggs* v. *Johnson County*, 6 Wall. 166, 187, 197; *Covell* v. *Heyman*, 111 U. S. 176, 183; *Rio Grande R. Co.* v. *Gomila*, 132 U. S. 478, 483), and that the state court's determination of the form of procedure not involving a question of jurisdiction is conclusive, *e. g.*, *Cornett* v. *Williams*, 20 Wall. 226, 250; *Laing* v. *Rigney*, 160 U. S. 531. See *Hekking* v. *Pfaff*, 82 Fed. Rep. 403, 404; *Lynde* v. *Lynde*, 181 U. S. 183, 186; *Fish* v. *Smith*, 73 Conn. 377, 391. The power of a court to execute its judgment is a very different thing from that jurisdiction of the person which is essential to litigation. Execution of a money judgment requires no jurisdiction of the person of the judgment debtor—it presupposes no right to be heard. And the determination of a lower state court as to its own jurisdiction, in plain conflict with the law as laid down in its statutes and as declared by its highest court, certainly cannot be accepted as due process of law. Inasmuch, therefore, as a final judgment in Kentucky cannot be executed by means of a receivership without the institution of a new suit, which presupposes a jurisdiction of the person and the right to be heard, the order of receivership in this case was clearly void for want of jurisdiction, irrespective of the validity of the original judgment.

Conclusion.

It is, therefore, submitted that the judgment appealed from should be reversed, on the ground that the Circuit Court had jurisdiction to grant the relief prayed for, and remanded with instructions that the complainant be accorded further hearing on the demurrer or otherwise in conformity with the practice in equity.

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